

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANDREW DORN,

Defendant-Appellant.

UNPUBLISHED

October 13, 2011

No. 297784

Kalamazoo Circuit Court

LC No. 97-001301-FC

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right¹ his jury convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 15 to 30 years' imprisonment for his assault conviction as an habitual offender, fourth offense, MCL 769.12, consecutive to two years' imprisonment for his felony-firearm conviction. We affirm.

Defendant's convictions stem from an argument between defendant and the victim. According to the victim, defendant confronted him angrily in a public park and demanded an explanation as to why the victim informed defendant's long-time partner that defendant and the victim had had a sexual relationship. The victim testified that the confrontation escalated and defendant produced a gun, held it to the back of the victim's head, and threatened to shoot. Defendant then stepped back a couple of feet, pointed the gun downwards and fired two shots, one of which struck the victim in the leg. The victim lunged toward defendant after defendant fired the gun, and while the two men struggled over the gun, it fired additional times. Defendant

¹ Defendant was convicted and sentenced in 1998 but did not timely file his original claim of appeal, apparently because the Michigan Department of Corrections mishandled it. Defendant's subsequent applications for leave to appeal were denied. 467 Mich 871 (2002); 474 Mich 1020 (2006). Ultimately, the United States District Court for the Eastern District of Michigan granted defendant's petition for habeas corpus relief to afford defendant the full appellate review he would have received but for the untimely submission of his claim of appeal. See *Dorn v Lafler*, 601 F3d 439, 445 (CA 6, 2010), abrogated by *Harrington v Richter*, ___ US ___, 131 S Ct 770, 784-785; 178 L Ed 2d 624 (2011).

eventually pulled away from the victim and fired the gun twice at the victim's chest; however, the gun merely "clicked" because it was out of bullets. Defendant denied that he possessed any intent to shoot the victim. Rather, defendant testified that as he was talking to the victim, the gun slipped out of his pants, and he and the victim both attempted to recover it. While the two men struggled over the gun, it was accidentally fired.

Defendant argues that the trial court erred when it denied his request that the jury be instructed regarding the misdemeanor offense of careless, reckless, or negligent use of firearms, MCL 752.861. We find that the trial court properly denied defendant's request, regardless of whether we apply the law governing lesser offense instructions as it existed at the time of defendant's 1998 conviction or as it currently exists.

"Questions of law, including questions of the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). We review a trial court's determination regarding whether the facts supported a requested jury instruction for an abuse of discretion. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). A trial court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

In 1998, a trial court presiding at a trial on a felony charge was required to instruct a jury regarding a lesser included misdemeanor offense when (1) there was a proper request; (2) an inherent relationship existed between the greater and lesser offense; (3) a rational view of the evidence supported the requested misdemeanor; (4) the defendant had adequate notice, and (5) no undue confusion or other injustice would result. *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). "Offenses are inherently related if they relate to the protection of the same interests and are related in an evidentiary manner such that, generally, proof of the misdemeanor is necessarily presented in proving the greater offense." *Id.* at 263.

The prosecution charged defendant with assault with intent to commit murder, MCL 750.83. In order to convict defendant of this offense, the prosecution had to prove three elements: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Defendant requested an instruction on careless, reckless, or negligent use of firearm resulting in death or injury to a person. In order to convict defendant of this offense, the prosecution would have had to establish that defendant "because of carelessness, recklessness or negligence, but not wilfully or wantonly, . . . cause[d] or allow[ed] any firearm under his immediate control, to be discharged so as to kill or injure another person. . . ." MCL 752.861.

The trial court correctly determined that giving the requested instruction was not warranted by the facts or the law. The two offenses do not have the requisite inherent relationship. Careless, reckless, or negligent use of firearms is a general intent misdemeanor that punishes an accidental and unintended injury or killing caused by the defendant's² use of a

² We note that defendant's own testimony at trial does not appear to support an instruction on careless, reckless, or negligent use of firearms.

firearm. An assault with intent to commit murder is a specific intent felony that punishes assaults committed with specific intent to kill. Thus, the two offenses are meant to protect different interests. Further, proof of the lesser offense is not necessarily presented as part of the showing of the commission of the greater offense. Assault with intent to commit murder does not require the use of a firearm; nor does it require injury or death. *McRunels*, 237 Mich App at 181.

Defendant also argues he would be entitled to the instruction under the current law governing lesser offense instructions. Defendant is mistaken. In *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003), this Court specifically ruled that careless, reckless, or negligent use of firearms is not a necessarily included offense of assault with intent to commit murder. Thus, “the offense at issue is a cognate lesser offense of assault with intent to murder, and would not be included in the jury instructions.” *Id.* at 174.

Defendant attempts to circumvent the ruling of *Lowery* by arguing for an application of the principles announced in *People v Wilder*, 485 Mich 35; 780 NW2d 265 (2010). *Wilder* has no favorable application in this case and, thus, does not support the giving of an instruction on careless, reckless, or negligent use of firearms in this case. The offenses at issue in this case, unlike those in *Wilder*, are not degreed offenses; nor are the offenses subject to multiple alternative statutory methods of completion. As such, there is no need to employ a “more narrowly focused evaluation” in this case. Moreover, and more importantly, the mere fact that defendant committed the assaultive offense with a gun does not establish by itself that the lesser offense would be subsumed into the greater offense as charged. Indeed, the lesser offense was not and cannot be subsumed into this case because each offense requires the establishment of a significantly different and contradictory intent element.

Defendant next argues that the prosecutor committed misconduct that deprived defendant of his right to a fair trial. He further argues that the trial court abused its discretion when it denied his motion for a new trial, the basis of which was this claimed misconduct. We reject both arguments.

We review claims of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). But, because defendant failed to object to the purported instance of misconduct at trial, we review defendant’s claim for plain error affecting substantial rights. *Id.* We review a trial court’s decision on a motion for new trial for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

Defendant argues that the prosecutor engaged in misconduct by forcing him to comment on the credibility of other witnesses during cross-examination. Defendant correctly observes that a prosecutor may not ask a defendant to comment on the credibility of the prosecution’s witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). He also correctly points out that the prosecution’s questions were improper because the prosecution specifically forced defendant to comment on whether the prosecution’s witnesses were telling the truth. But, we find that the error did not result in unfair prejudice to defendant. Defendant “dealt rather well” with the prosecution’s efforts to discredit him and following a timely objection, a cautionary instruction would have cured any prejudice. *Id.* at 17-18. Moreover, the evidence against defendant was

significant; thus, we are unconvinced that the error was outcome determinative or that the jury verdict resulted in the conviction of an actually innocent individual. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

For these same reasons, we find that the trial court's decision to deny defendant's motion for a new trial falls within the range of principled outcomes. *Blackston*, 481 Mich at 460.

Next, defendant argues that defense counsel provided constitutionally ineffective assistance. We disagree.

In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). To demonstrate defense counsel was deficient, the defendant must overcome the strong presumption that the alleged deficiency was trial strategy. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). To demonstrate prejudice, the defendant must "show a reasonable probability that the outcome would have been different but for counsel's errors." *Id.* at 486. A defendant "has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that his counsel was ineffective for failing to investigate potential witnesses and for failing to call these witnesses to testify. Defendant claims that the testimony of these witnesses would have corroborated his testimony and cast doubt on the testimony of the prosecution's witnesses. Our review of the record reveals that defendant failed to offer any affidavits or other documentary evidence at the hearing on the new trial motion in support of his claim. Defendant's unsubstantiated assertions, without more, are insufficient to sustain a claim of ineffective assistance. Defendant has failed to establish either the factual predicate for his claim, or that he suffered prejudice. *Hoag*, 460 Mich at 6; *Pickens*, 446 Mich at 327.

Defendant next argues defense counsel was ineffective for failing to fashion a defense around defendant's HIV-positive status. According to defendant, counsel should have presented evidence that the victim was angry at defendant for not disclosing his HIV-positive status before defendant had a sexual relationship with the victim. Defendant argues that if the jury would have known that the victim had a reason to be upset with defendant, it likely would have believed defendant's testimony that the victim was the aggressor. Defense counsel's decisions regarding which theories to argue at trial and what evidence to present are matters of trial strategy that this Court will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We find that defense counsel's decision to omit any reference to defendant's medical condition constituted reasonable trial strategy. Although additional information providing a motive for the victim's aggression may have bolstered defendant's theory that the victim was the aggressor, the admission of evidence of defendant's HIV status carried a significant potential for prejudice. The evidence would have portrayed defendant in a bad light because defendant would be admitting both criminal and deceitful conduct if he knew he was HIV positive and engaged in sexual penetration with the victim without first informing the victim of his medical condition. MCL 333.5210. Defense counsel's decision to keep this information from the jury was reasonable under these circumstances.

Defendant also argues defense counsel should have asserted a voluntary intoxication defense to negate the specific intent element of assault with intent to commit murder or assault with intent to do great bodily harm. At the time of defendant's trial, voluntary intoxication was a permissible defense.³ But intoxication only provided a defense if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent. *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). Defendant's testimony regarding the events of the night was detailed and specific. Moreover, the testimony of the various witnesses supports a conclusion that a voluntary intoxication defense was not viable. Indeed, the record is devoid of any evidence from which it may be inferred that defendant was so intoxicated that he could not form the necessary intent. Thus, defense counsel was not ineffective for failing to advance the theory of voluntary intoxication because counsel does not have an obligation to make meritless arguments. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Next, defendant argues that trial counsel was ineffective for failing to object to the prosecutorial misconduct discussed already. We find that defense counsel performed deficiently by failing to object to the prosecutor's line of questioning; however, defendant is not entitled to any relief because defendant cannot establish that he suffered prejudice as a result of counsel's deficiency. Defendant handled the prosecution's question without difficulty, and his testimony did not bolster the credibility of the prosecution's witnesses or prejudice his own testimony. In light of the significant evidence inculcating defendant, there is no reason to believe that but for counsel's failure to object to the prosecution's line of questioning the result of the proceedings would have been different.

Moreover, for the reasons set forth above, the trial court did not abuse its discretion when it denied defendant's motion for a new trial or an evidentiary hearing. *Blackston*, 481 Mich at 460, 473; *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997).

Defendant also argues that the 12-year delay between his conviction and sentencing and this Court's entertaining this appeal deprived him of due process and entitles him to the vacation of his convictions and sentences. Alternatively, defendant requests that this Court either vacate his conviction and remand for entry of a conviction of careless, reckless, or negligent discharge of a firearm, or grant defendant a new trial, or remand for an evidentiary hearing. Defendant's claim of a due process violation lacks merit. Delay in appellate review violates due process only if the delay prejudices the defendant. *People v McNamee*, 67 Mich App 198, 205; 240 NW2d 758 (1976). Defendant suffered no prejudice where the record evidence supported his conviction, and the delay did not adversely affect his grounds for appeal or our ability to assess the merits of those grounds.⁴ *United States v Smith*, 94 F3d 204, 207-212 (CA 6, 1996).

³ The Legislature generally abolished the defense of voluntary intoxication by enacting 2002 PA 366, effective September 1, 2002. See MCL 768.37.

⁴ Moreover, this Court reviewed and denied defendant's discretionary appeal "for lack of merit in the grounds presented." (Docket No. 219394; October 2, 2000), lv den 467 Mich 871 (2002). Subsequently, on August 16, 2005, this Court entered an order denying defendant's application

In his Standard 4 brief, defendant raises several challenges to his sentence and the accuracy of the contents of his presentence investigation report (PSIR). We find that none of defendant's claimed inaccuracies necessitate a remand for the correction of the PSIR or resentencing.

Defendant asserts that the trial court erred when it failed to strike as inaccurate the statement that defendant was AWOL from a halfway house on January 8, 1989. The record reveals that defendant was in jail on that date, which established that defendant was absent without permission from the halfway house. Thus, the trial court did not abuse its discretion when it determined that the statement was accurate and should remain in the PSIR. *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2006).

Defendant also asserts that the PSIR inaccurately indicates that he has two convictions for resisting and obstructing a police officer. According to defendant, he has only one such conviction. The trial court expressly stated on the record that it would attribute only one such conviction to defendant, for purposes of sentencing. A failure to strike disregarded information can be harmless. *People v Fisher*, 442 Mich 560, 567 n 4; 503 NW2d 50 (1993). Here, defendant has not shown that the error caused him any adverse sentencing consequence. Thus, any failure to strike is harmless, especially where the existing record does not contain any information confirming defendant's claim of an inaccuracy.

Defendant's remaining challenges to the accuracy of information contained in the PSIR are based on documentation not contained in the lower court record. We do not consider these challenges because it is impermissible to expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

Finally, defendant argues that he should not have been sentenced as a fourth offender, MCL 769.12, because one of the convictions the trial court relied on for defendant's habitual offender status is not a valid conviction. But defendant did not challenge the conviction in the trial court; therefore, this claim is not properly preserved for appellate review. Defendant does not highlight any evidence contained in the record to support his assertion that he does not actually have the required predicate convictions to be sentenced under MCL 769.12. The presentence investigation report indicates defendant had three previous felony convictions, and on the record before this Court defendant has failed to demonstrate plain error affecting his substantial rights. *Carines*, 460 at 763. Defendant is not entitled to resentencing.

We affirm.

/s/ Jane E. Markey
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause

for leave to appeal the trial court's denial of defendant's motion for relief from judgment (Docket No. 260553), lv den 474 Mich 1020 (2006). Defendant "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *Id.* See *Dorn v Lafler*, 601 F3d at 442.